BIOSOLIDS TECHNICAL ADVISORY COMMITTEE
Amendments to Biosolids Regulations after Transfer from VDH to DEQ

FINANCIAL ASSURANCE SUBCOMMITTEE

DRAFT MEETING NOTES
SUBCOMMITTEE MEETING – TUESDAY, APRIL 21, 2009
DEQ CENTRAL OFFICE 2ND FLOOR CONFERENCE ROOM

Meeting Attendees

SUBCOMMITTEE MEMBERS	*INVITED PUBLIC*	*DEQ STAFF*
Rhonda L. Bowen	Chris Pomeroy – AquaLaw/VAMWA	Leslie Beckwith
Tim Hayes		Bill Norris
Larry Land		Neil Zahradka
Chris Nidel		

Subcommittee Member Absent: Henry Staudinger

1) Welcome (Leslie Beckwith):

Leslie Beckwith, Director of DEQ's Office of Financial Assurance and Chair of this Subcommittee, welcomed all of the subcommittee members to the meeting of the Financial Assurance Subcommittee of the Biosolids Technical Advisory Committee. She reviewed the goal of the subcommittee which is to review different "financial assurance" mechanisms/options that are available to meet the statutory requirements of Section 62.1-44.19:3.H and to present those findings to the full Biosolids Technical Advisory for a consensus vote.

> *H. All persons holding or applying for a permit authorizing the land application of sewage sludge shall provide to the Board written evidence of financial responsibility, which shall be available to pay claims for cleanup costs, personal injury, and property damages resulting from the transportation, storage or land application of sewage sludge. The Board shall, by regulation, establish and prescribe mechanisms for meeting the financial responsibilities of this section.*

She noted that the group had to date discussed the possible use of a "Contractors Pollution Liability Policy" (CPL) which is an "occurrence" insurance policy that would cover any type of environmental pollution/environmental damage done away from the policy holders own facility, i.e., in transport from the generation site to the farm for application and the application of the material on the site. She noted that a concern had been raised during the previous discussions regarding the inability of such a policy to cover "willful and intentional acts" that result in environmental pollution/environmental damage.

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2) Citizen Representative Comments (Henry Staudinger/Leslie Beckwith):

Leslie Beckwith noted that Henry Staudinger was unable to attend the meeting of the subcommittee

due to a conflict, but that he had forwarded his comments on the subject of "the provision of evidence of financial assurance" for consideration by the subcommittee. (This information had been forwarded to the Subcommittee members prior to the meeting.) His comments included the following:

I. Background

The Virginia Code provides: "H. All persons holding or applying for a permit authorizing the land application of sewage sludge shall provide to the Board written evidence of financial responsibility, which shall be available to pay claims for cleanup costs, personal injury, and property damages resulting from the transportation, storage or land application of sewage sludge. The Board shall, by regulation, establish and prescribe mechanisms for meeting the financial responsibility requirements of this section." § 62.1-44.19:3.

The regulation currently requires that the permit holder "provide…written evidence of financial responsibility, including both current liability and pollution insurance, or such other evidence of financial responsibility as the board may establish by regulation in an amount not less than $1 million per occurrence, which shall be available to pay claims for cleanup costs, personal injury, bodily injury and property damage regulating from the transport, storage and land application of biosolids in Virginia. The aggregate amount of financial liability maintained by the permit holder shall be $1 million for companies with less than $5 million in annual gross revenue and shall be $2 million for companies with $5 million or more in annual gross revenue." 9VAC25-32-390.

The Virginia Code language was written by the sludge industry at a time when every locality had different financial responsibility requirements and the sludge industry wanted VDH to make this decision for all localities. The VDH regulations ultimately reflected language that was acceptable to the applicators.

II. Comments Relating to Use of Insurance to Satisfy Evidence of Financial Responsibility

One only needs to look at the current economy to recognize that no company is too big to fail. Thus insurance has become a critical factor in meeting the financial responsibility requirement set forth in the Virginia Code. Based on the information provided by an insurance representative at the first TAC Insurance Subcommittee meeting, if the proper insurance policy is in place, funds to pay the statutory claims would be available as long as there was not a willful violation and the policy limit as not been used up by claims.

Thus any regulatory provision must clearly mandate the proper insurance policies. However, there are a couple of unresolved issues that need to be clarified as to whether insurance funds will be available to pay claims.

The first is how to ensure that the regulatory requirement remains in place in the event of any claims paid out. If any payments are made under the policy, the amount of coverage is reduced and can ultimately be zero. Thus there needs to be an understanding as to how policies levels contemplated by the regulations are to be maintained when any insurance claim is paid out, thereby reducing the level of insurance coverage.

The second is a clear understanding as to how each locality will be assured of insurance coverage. It is my understanding that for each locality to have such assurance, the policy amount must be available even if claims are paid in connection with applications made in other localities. Based on my understanding of the available insurance coverage, that would require separate insurance policies for each permit issued. That would have to be clearly set forth in the regulations.

- *Additional Evidence of Financial Responsibility Required*

Unless the amount of insurance coverage discussed at the TAC meeting is substantially increased, DEQ will

have to look beyond insurance policies to assure that there is sufficient financial responsibility to ensure the availability of adequate funds. Thus it would be important to establish net worth requirements based on the amounts of sludge land applied. This would need to be supplemented by parent company and/or other shareholder guarantees.

Unfortunately, history has shown that net worth comes and goes. Thus there is no assurance that assets will be available to pay substantial claims. Because the greatest long term risks may come from constituents in the biosolids, to satisfy the statutory financial responsibility requirements, DEQ must also look to financial commitments of the sludge Generators. Hold harmless commitments, at least as to risks associated with the content of biosolids that the applicators may be unable to provide compensation for, would not only be prudent, but necessary to satisfy the statutory requirement.

If insurance companies should agree with the Generators that there is little risk associated with land application of biosolids, the Generators can protect themselves by taking out their own insurance coverage with little cost. On the other hand, if the insurance companies consider the risk to be high and premiums reflect that risk, Generators can decide for themselves to assume the risk of land applying their biosolids or using an alternate method of disposal.

The subcommittee members reviewed each of summary statements provided in the cover email for these comments. Discussions of the subcommittee members included the following:

"1. Insurance doesn't cover intentional violations. This is a great concern because it has been my experience that most, if not all, applications violate one or more statutory or regulatory requirements."

- A question was raised regarding the current DEQ experience with permits and violations. Staff noted that out of the over 1200 inspections conducted for biosolids application that there had been 11 warning letters issued.
- If there is an intentional violation that the real question is what does that mean for "financial assurance". The keypoint is that if the violation is determined to be intentional or willful that insurance would not provide coverage.
- A question was raised as to whether any of the warning letters/violations encountered involved intentional acts and wouldn't those result in criminal charges? Staff noted that they had not encountered any violations that resulted in criminal charges.
- One of the subcommittee members noted that he had in fact seen intentional violations but he was unaware of any personal injury or property damage claims that had been filed as a result of these violations.
- The violation has to cause the injury.
- The concern is to have something in place to address instances where over-application leads to or might lead to property damage or create a nuisance.
- The statement made regarding "most, if not all applications violating one or more statutory or regulatory requirements" is an inflammatory statement and probable does not need to be made. We have a statutory mandate to make sure that "financial assurance" mechanisms are provided, so that is what we should be addressing.
- Staff noted that "financial assurance" is used in other DEQ programs as a backup. The entities involved would be responsible for payment of any claims and damages. Financial assurance, as a 3rd Party Liability, would be there to provide available funds so that the taxpayers (citizens) would not have to pay.
- The biosolids regulations were requested by the industry as a way to provide more

consistency in the rules and regulations governing the use and application of the material.

- Financial assurance would provide an ability to pay for damages and injury. This backup liability, whether it is $1 million or $2 million should be consistent across the board.
- When the biosolids regulations and financial assurance requirements were formulated it was with the basic approach that "We know how to do it in Virginia". It was not with the idea of changing the way we did things or to create entire new mechanisms it was to use the mechanisms that we already had in place.
- The idea of the use of a "local government guarantee" was discussed. Staff noted that they had an Attorney General's opinion that local governments in Virginia could be party to a "local government guarantee", i.e., the City of Charlottesville and the County of Albemarle and the operation of the Ivy Landfill.
- The priority is to make sure that there is compliance with regulatory requirements. Don't want to get into a situation trying to or having to guarantee liability in the future.
- Staff noted that financial assurance for landfills addresses a finite set of requirements, i.e., post-closure.
- Staff noted that for the Hazardous Waste Program that there is a 3rd party Liability requirements with a "financial test" guarantee of $2 million for TSPs and $3 million for land disposal. These address both bodily injury and property damage. The owner/operator is required to notify DEQ (Regional Administrator) of any claims made against the policy. Staff noted that to date that no one has seen a "valid" claim.
- The members were unaware of any personal injury claims made in Virginia under the RCRA program.
- If we think that the regulations are protective then how do we differentiate between "accidental versus willful" violations. The broad question is "what are we mandated to do?"
- If you assume that there was a "willful violation" then how do you get paid for damages? An insurance policy will not pay for "willful violations". The only recourse for a "knowing and willful violation" that causes damages is through the courts as a "criminal charge".
- The amounts of $1 million and $2 million in "financial assurance" are on the table. If those numbers are acceptable there is still no coverage available through the use of an insurance policy for a "willful violation". This creates a need to provide some form of "gap coverage".
- There is an obligation to be consistent across the existing programs. There are certain requirements for providing an insurance policy for $2 million as a means of showing evidence of "financial assurance", including an "audited financial statement" and/or a "local government financial test".
- The usual situation when there was a claim made in the case of "personal injury" would be for a company's corporate assets to be used to pay for the claim instead of being paid out of an insurance policy.

"2. It remains unclear how much insurance is actually contemplated. Unless there is separate coverage for each permit, a single permit may use up the entire amount, with no coverage for applications in other localities. That would not be consistent with the statutory requirements."

- The aggregate for the insurance policy providing "financial assurance" is contemplated

to be $2 million.

- During a previous discussion: The group discussed the “limits of loss”. The TAC had agreed to set a minimum limit at $2 million. The suggestion was that this would be set as $1 million per occurrence with a $2 million total. Staff suggested that the reason that a $2 million minimum was recommended is because DEQ has no history to go on as to what it would actually cost.

“3. I am unaware of how to keep the coverage up once there has been a payment to sludge victims by the insurance carrier – i.e., the amount is suddenly below that required by the regs and the applicator may not be able to bring the insurance coverage following an insurance payment. Thus in order to comply with the statute, such applicators would be disqualified from future applications.” --

- Staff noted that there would be a requirement that when a payment was made that reduces the amount available below the $2 million that the permittee would be required to “replenish the mechanism”.
- If a number of claims are made against an insurance policy, the carrier may decide to either “cancel the policy” or “increase the premiums”. If that occurs then the permittee would have to either pay the increased premiums or provide evidence of financial assurance through a different mechanism, such as a “bank letter of credit”.
- A concern was raised regarding a company possible paying out damages up to an established cap and there being damage claims far in excess of that cap. This could result in companies being forced out of business.
- There aren't a lot of lawsuits being filed, so there probably doesn't need to be a huge cap.
- A concern was raised over the potential impacts that these requirements might have on the smaller “Mom and Pop” operations.
- “Knowing and Willful” violations result in criminal liability.
- A concern was raised over how “historic violations' would be handled. If a violation occurred while the program was being handled by the Virginia Department of Health, how would that be addressed now that the program is being managed by DEQ? Staff responded that if something had occurred in the past and is not currently ongoing that the department would not go back to address historic VDH Biosolid permits and applications made under that program. If the violation is currently ongoing under an active permit being managed by DEQ since the transfer of the program from VDH then the program staff should be notified of the particulars of the violation so that it can be properly investigated. If the violation occurred in the past but is part of a current permit, i.e., the material is not currently being applied, the department program staff should be notified of the details so that it can be noted for future inspections should applications resume under the permit. The members also discussed the possible use of reporting of violations under the Clean Water Act or the Agricultural Stewardship Act as other possible mechanisms to deal with “historic” violations.
- The members agreed that we can't reach an agreement on how to address a “knowing or willful violation" of the regulations. This is a gap/concern that needs to be acknowledged and provided as part of the information given to the board for consideration. This is a policy question that will need to be addressed by the board and through possible future General Assembly actions/proposals.
- If there is a “willful violation” there is a criminal violation where the permittee would be

tried for negligence and there may be resulting criminal fines and possible jail terms.

- In a criminal proceeding it would be the purpose of the jury to make the ultimate decision whether the violation that caused personal or property damage was a "willful or knowing violation".
- Under a criminal proceeding, you have to prove "willful intent". The willingness to pursue a case is usually very low.
- Staff noted that this gap regarding providing coverage for "willful violations" is NOT covered in other existing DEQ programs. Staff also reminded the group that we don't have a defined history with this program at DEQ to be able to say whether there is a problem or not.
- Insurance polices don't cover "intentional acts".
- Don't want to create a situation where there is only one company or only the bigger companies can participate in this program.
- Consideration should be given to "scaling" the requirements to address the smaller "Mom & Pop" operations.
- The insurance policy premiums should be based on the materials liability. The smaller companies apply a smaller amount and percentage of the materials and therefore have potentially a much smaller liability or exposure. The rates and financial assurance requirements should be scaled and based on the market and the amount of materials being handled.
- Staff reminded the group that we are not trying to come up with a one size fits all mechanism but are trying to identify the various mechanism for providing evidence of financial assurance that could be part of the available "tool box" for all the companies involved in the application of biosolids under this program.

"For these reasons, insurance requirements must be supplemental if the financial responsibility requirements are to be met. Supplementation might include a net worth test tied to the amount of sludge applied. However, since it is so easy for an applicator to go bankrupt, no net worth test would probably meet the statutory requirement. Other options could include:

1. *Parent company and/or shareholder guarantees.*
2. *Guarantees from generators because major harm could occur because of what is in the biosolids, rather than specific actions of the applicator. A good example would be the presence of PCBs in milorganite.*

- Localities/local governments should not be responsible for insuring private companies.
- A question was raised regarding a local governments "sovereign immunity".
- A question was raised regarding the statute of limitations that would apply to this program. The statute of limitations is 2 years.
- Staff noted that one of the questions raised during a previous discussion was: A question was raised that asked "If unknown to me my contractor broke the law, do I as the Generator and permit holder have to accept liability for his actions?" That is the gap that needs to be filled.
- It was suggested that no part of the statutory requirements dictate that new mechanisms be developed to address the financial assurance requirements, rather that we look to the existing programs and mechanisms to identify a means to provide the required assurances through the use of existing mechanisms. There is nothing unique here. We

just can't provide for every hypothetical situation. Financial assurance will never be able to provide for 100% coverage.

- A concern was raised that some may be overlapping and confusing the issues of liability with financial assurance. The statutory changes had noting to do with changing the liability for one's actions but rather took a step toward providing consistent mechanisms for providing financial assurance for addressing any damages.
- The use of this material (biosolids) has been approved for use statewide by the General Assembly and its application and use is governed by laws set forth by the General Assembly and enforced through regulations developed in response to those laws and statutes by a State Agency and through an approved process those applying the materials have been through a permitting process to obtain licenses/permits to apply the materials. All of these stages have occurred under a cycle of public activity and participation.
- The broad issue or problem is compliance with what the government says needs to happen to be able to use and apply this material. "Common Law" still applies. Even though this is a permitted activity there can still be negligence.
- In the case of "financial assurance" requirements for landfills there is a very clear "cause & effect" relationship for environmental consequences of negligent actions. There are no demonstrated "causal linkages" in the science or literature when addressing environmental consequences of negligent actions related to the application of biosolids. We just don't have the answers, so it becomes by default a "policy issue".

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3) Discussion of Regulatory Requirements and Other Mechanisms for Providing Evidence of Financial Assurance (Leslie Beckwith)

Leslie Beckwith initiated a discussion of the regulatory requirements for providing financial assurance and the mechanisms that might be available for providing that required financial assurance. She provided the following options:

1. Occurrence Insurance Policy: This would be a Virginia specific events claims policy that would cover any event that resulted in damages that occurred during the policy period. It would be specific to sites in Virginia. It would need to be issued by an insurance company licensed to transact the business in Virginia or eligible to provide insurance as an excess or surplus lines insurer in Virginia that has a rating of A- or better by A.M. Best Company. The insurance company would be required to notify DEQ within 30 days of any claim made against the policy that reduces the amount of insurance available.

Discussions by the subcommittee members included the following:

- During a previous discussion: It was recommended that any insurance policy used should have the "coverage" endorsed to cover only Virginia activities and sites. The insurance should be specific to Virginia. Staff noted that DEQ currently specifies that requirement in other existing programs.
- Staff noted that there would need to be an annual demonstration made regarding the financial assurance capability. This is required in other DEQ programs.
- Staff noted that the draft language for providing this type of mechanism for financial

assurance would reference the specific section of the code dealing with biosolids.

- A suggestion was made that instead of the use of the phrase "...licensed to transact the business of insurance in Virginia..." that it should be "...authorized by the SCC to transact the business of insurance in Virginia...".
- In addition to the requirement for notification of any claims made against the policy the insurance company would have to notify DEQ 120 days in advance of the cancellation of a policy.
- A suggestion was made that in addition to requiring the insurance company to notify DEQ that since the insurance company is under no statutory requirement to provide this notification that the permittee also be required to notify DEQ of any claims or any changes in the policy or policy coverage. This notification requirement could be made part of the insurance contract between the insurance company and the insured.
- Staff noted that we currently have a few insurance policies included as "financial assurance" mechanisms in the agencies existing programs.
- Staff noted that all of the currently used mechanisms include the 120 day notification requirements for the provider.
- A suggestion was made that language should be included in the regulation that provides that "When the provider of financial assurance is no longer to provide coverage that DEQ is notified and the permit holder has a certain time period in which to provide other mechanisms to provide the required financial assurance.

2. Corporate/local government financial test: This would require the meeting of certain financial ratios and would also require the notification of DEQ of any claims made which reduces the amount available.

Discussions by the subcommittee members included the following:

- This would require a bond rating test (AAA rating).
- Staff noted that under the Solid Waste program that a permittee's tangible net worth is required to be greater than $2 million (aggregate) plus any other environmental obligations. Under landfills and tanks and biosolids the tangible net worth would need to be enough to cover any other environmental obligations plus $10 million.
- There would need to be an "assets to liability" ratio.
- Staff noted that local governments had to meet the 43% ration requirements. Their total environmental liability cannot exceed 43% of their total revenues.
- A figure of $2 million for the financial assurance requirement for biosolids was suggested by the TAC as a reasonable level of coverage. Staff noted that it was simpler to deal with a flat rate of $2 million than the try to address a number of different amounts. Staff noted that it had not addressed the "local government test" requirements.
- A concern was raised whether we are sending a signal to "small town Virginia" to halt land applications of biosolids by setting too stringent requirements.
- Staff noted that the certification of funding requirements were already required to be demonstrated for other DEQ programs.
- A suggestion was made that there should be a "waiver" provided for local governments from the financial assurance requirements. The possibility of having two possible categories of requirements or financial assurance amounts to address larger versus smaller localities. There is the potential for a lot of disruption for smaller localities with

small volumes of biosolids. Staff noted that even with a waiver of these requirements a permit would still be required.

- It was suggested that when this requirement was originally drafted that the program only applied to contractors and VDH permit holders (DEQ VPA permit holders). Now that the program is being managed by DEQ it falls into a code section that applies to both VPA and VPDES permit holders, so that it applies to local governments as well.
- Localities have a revenue stream and therefore have a broader latitude in paying for financial responsibilities. Contractors on the other hand have more limited options and therefore defined "financial assurance" mechanisms should be required.
- It was suggested that maybe there should be consideration given to a tonnage or volume of material exemption or adjustment in financial assurance requirements.
- In looking at the "complaint database", there doesn't seem to be a lot of complaints, if any, with small generators. Maybe a threshold limit should be established below which there would be no financial assurance requirements or a lower required amount could be used. The subcommittee members agreed that a threshold amount would be reasonable.
- It was agreed that an overall waiver for local governments dealing with small tonnages of materials should be considered.
- It was suggested and agreed to that regulatory language should be developed that if a locality applies their own biosolids under a VPDES permit and don't apply more than XX tons per week/month that they satisfy the financial assurance requirements.
- Staff noted that the liability does not go away because of less quantity of material. Towns and localities, because they exist, generate revenues.
- Don't see the little guys (towns) complained about. Don't know what the real impact of the 2 or 3 truck loads a week/month are but if the little guys don't have to do anything it is probably no big deal.

ACTION ITEM: Staff will look at the potential impact of the financial assurance requirements on smaller localities and determine is a sliding scale or a range of financial assurance amounts should be recommended.

ACTION ITEM: Staff will look at specific localities that are applying biosolids to determine the amounts being applied, in consideration of the development of a possible waiver or revised financial assurance requirement.

3. Corporate/local government guarantee: Under this scenario, the corporation or local government would need to meet the requirements of a financial test in addition to the guarantee. The guarantor may be a parent company or other entity that has substantial business relationship with the permittee. There would also be a notification requirement for any claims made which reduces the amount available.

Discussions by the subcommittee members included the following:

- As a practical matter, local governments would not be providing guarantees for contractors/private businesses, so the need to include this as an option is questionable.

4. Fully funded trust funds: Included to cover the possibility that someone had their own funds

available to cover the needs for financial assurance.

ACTION ITEM: Staff will develop biosolids specific language for each of the proposed "financial assurance" mechanisms. This draft language will be distributed to the Biosolids Financial Assurance Subcommittee Members for review and comment prior to distribution and presentation to the full TAC for their consideration. This presentation to the full TAC will likely be scheduled for the May meeting of the TAC.

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4) Meeting Adjournment

The meeting of the subcommittee was adjourned at 2:00 P.M.